

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 94-267

In re)
)
Revision of) MM Docket No. 91-140
Radio Rules and Policies) RM-8414

SECOND MEMORANDUM OPINION AND ORDER

Adopted: October 20, 1994;

Released: November 8, 1994

By the Commission: Commissioner Barrett issuing a separate statement.

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I. INTRODUCTION

1. This *Order* disposes of petitions for reconsideration of the *Memorandum Opinion and Order and Further Notice of Proposed Rule Making* in MM Docket No. 91-140, 7 FCC Rcd 6387 (1992) (hereinafter *First Reconsideration Order*), which revised the

Commission's rules governing the ownership of interests in multiple radio stations.¹ In the *First Reconsideration Order*, the Commission revised Section 73.3555 of the Commission's Rules (47 C.F.R. § 73.3555) to increase the national radio ownership limit from 12 AM and 12 FM stations to 18 AM and 18 FM stations, and ultimately to 20 AM and 20 FM stations.² The Commission also revised the national minority ownership cap, which had permitted non-minority owners to take a non-controlling interest in an additional two AM and two FM stations that were minority-controlled, and permitted minority owners to own an additional two stations outright (*i.e.*, 14 AM and 14 FM stations). The *First Reconsideration Order* modified the rule to permit all owners to take a non-controlling interest in an additional three stations per service above the national caps if those stations were controlled by minorities or small businesses. It declined to adopt a provision allowing minority broadcasters to own more stations outright.

2. The *First Reconsideration Order* also relaxed the local ownership limit, which had been one AM and one FM station per area, to permit common ownership of up to two AM and two FM stations, depending on the size of the market. Specifically, in markets with 15 or more stations, an individual or group may acquire up to two AM and two FM stations provided that the combined audience shares of those stations does not exceed 25 percent of the local radio market. In markets with fewer than 15 stations, a single owner may acquire a total of three stations, no more than two of which may be in the same service (*i.e.*, AM/AM/FM or AM/FM/FM), provided that the group owner's stations represent less than half of the total number of stations in the market. (The implementation of this rule is explained further below.) Finally, in the *First Reconsideration Order* the Commission declined to revisit its prior determination that certain time brokerage arrangements would be treated as attributable ownership interests for purposes of the multiple ownership rules.

3. Petitions for reconsideration of the *First Reconsideration Order* were filed by the League of United Latin American Citizens (LULAC), the National Association of Black Owned Broadcasters, Inc. and the National Black Media Coalition (NABOB/NBMC), and the Telecommunications Research and Action Center and the Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights (TRAC/WACC). LULAC questions the propriety of the general rule relaxation, arguing that we should permit a licensee to increase

¹ The *First Reconsideration Order* modified the Commission's initial decisions in this proceeding, adopted in the *Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 2755 (1992) (*Report and Order*), before the rules adopted in the *Report and Order* became effective.

² Pursuant to the *First Reconsideration Order*, the national limit increased to 20 AM and 20 FM stations on September 16, 1994 (*i.e.*, two years after the effective date of the initial rules). 7 FCC Rcd at 6390. The Commission's initial determination in the *Report and Order* would have raised the national ownership limit to 30 AM and 30 FM stations. 7 FCC Rcd at 2765.

the number of stations it owns in a market only where necessary to save a station from going off the air. LULAC and NABOB/NBMC challenge the revision of the minority ownership incentives in the national ownership rule and the establishment of a small business incentive. TRAC/WACC challenge the sufficiency of the rules governing time brokerage arrangements, contending that Commission staff determinations have not adequately held licensees accountable for brokered stations. The National Association of Broadcasters (NAB) filed comments with respect to all three petitions. Larry A. Duke, President of Duke Radio Broadcasting, Inc. and Duke Broadcasting Corporation (Duke), filed comments in the form of a letter concerning the definition of small markets for the purpose of applying the new ownership rules.

4. In addition, due to its relevance to the issues under evaluation in this proceeding, we herein consider, on our own motion, a Petition for Rule Making (RM-8414) filed by NAB concerning changes to the local radio multiple ownership rules as applied to small markets, and comments filed in response to that petition.³ We also take this opportunity to provide greater specificity regarding the administration of certain aspects of the revised ownership rules. These clarifications are based on questions raised by radio licensees and other interested parties over the past two years.

5. Although we generally affirm the rules as adopted in the First Reconsideration Order, we are revising the national limits to increase the national cap for minority owners to 25 AM and 25 FM stations, and to raise to five the number, in excess of the national limits, of minority or small business-controlled AM or FM stations in which a non-minority broadcaster may hold a non-controlling interest. In addition, because of concerns raised by a number of parties with respect to the effects of the revised rules on competition and diversity in radio markets, on our own motion, we have reviewed the rules in light of relevant economic and antitrust principles. As set forth below, our analysis of these principles leads us to conclude that the rules, as adopted, are consistent with established principles of competitive analysis and at the present time provide adequate safeguards to ensure acceptable levels of diversity in the radio marketplace.⁴

II. ANALYTICAL FRAMEWORK

6. The Commission has a mandate to regulate radio broadcast licensees in the

³ The NAB Petition was listed on an FCC *Public Notice*, Report No. 1996, released January 11, 1994. Only one party -- Duke -- filed responsive comments.

⁴ Concurrently with this item, we are releasing a staff report analyzing the state of the radio industry in light of the 1992 relaxation of the ownership rules. *Radio Station Ownership Report*, FCC Mass Media Bureau, October 20, 1994.

public interest.⁵ In terms of the radio license ownership limits, there are two principal components of the Commission's "public interest" mandate -- competition and diversity.⁶ The Supreme Court has recognized that "the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power."⁷

A. Diversity Issues

7. A primary foundation of ownership limits has been the concept of diversity of ownership. It has been the cornerstone of past analyses that diversity of owners (outlet diversity) leads to diversity of viewpoint (content diversity).⁸ As the *Report and Order* in this proceeding notes, both outlet and content diversity have increased markedly in the past ten years. This resulted from not only a substantial increase in the number of radio stations but also from the development of new communications and mass media outlets.⁹

B. Competitive Issues

8. The public interest standard includes examination of competitive issues -- indeed, the Commission is empowered to "make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations."¹⁰ Competition is a means to the ends of maximizing consumer welfare and efficient allocation of resources. There appear to be other competitive substitutes for radio from the listeners' perspective -- for example, music and talk format programs on broadcast and cable television, compact discs and music videos. There also may be reasonable substitutes for radio advertising from the advertisers'

⁵ See Section 303 of the Communications Act, 47 U.S.C. § 303.

⁶ See *Report and Order* at 2761.

⁷ *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 780 (1978).

⁸ See, e.g., *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990) (recognizes evidence demonstrating nexus between increased minority ownership and diversity of programming).

⁹ *Report and Order* at 2757-58.

¹⁰ *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (quoting *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 961 (D.C. Cir. 1968)); see also *FCC v. RCA Comm., Inc.*, 346 U.S. 86, 94 (1952).

perspective, such as such as newspapers and billboards.¹¹ Given this increasing proliferation of competitors to broadcast radio, the Commission believes that the public interest is best served by greater reliance on competitive forces, rather than governmental regulation, to achieve these outcomes.

9. The competition aspect of the public interest primarily relates to protecting consumers and companies possibly subject to bottleneck monopolies due to the potential abuse of market power by a firm or a group of firms. The purpose of a competitive analysis is to determine whether in fact a firm or group of firms have and exercise such market power. Horizontal market share or concentration and barriers to entry are key factors in determining whether market power exists.¹² Regulatory barriers to entry in the radio market are significant -- *e.g.*, applicants must obtain a license, such licenses are scarce, and assignments or transfers of licenses must be approved by the Commission. Thus, market share and concentration ratios may be more important in evaluating market power in radio markets than in many other markets.¹³

10. Market shares and concentration can only be assessed after relevant markets are determined. As a result, the first step in a competitive analysis is to define the relevant product and geographic markets. The Supreme Court has stated that in defining a product for antitrust law purposes, "no more definite rule can be declared than that commodities *reasonably interchangeable by consumers for the same purposes*" constitute one product market.¹⁴ In general, the relevant geographic market refers to the area where buyers of the

¹¹ For a recent analysis of own-price and cross-price elasticities of demand for advertising media, see Barry J. Seldon & Chulho Jung, *Derived Demand for Advertising Messages and Substitutability Among the Media*, 33 QUARTERLY REVIEW OF ECONOMICS AND FINANCE 71-86 (Spring 1993). See also John C. Busterna, *The Cross Elasticity of Demand for National Newspaper Advertising*, JOURNALISM QUARTERLY 347-351 (Autumn 1987).

¹² *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (high market share may raise an inference of monopoly power).

¹³ See *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 366 (9th Cir.) ("A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors."), *cert. denied*, 488 U.S. 870 (1988) (citations omitted); see also *United States v. Syufy Enterprises*, 903 F.2d 659, 664 (9th Cir. 1990).

¹⁴ *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956) (hereinafter "*Cellophane*"); see also *Brown Shoe Co. v. United States*, 370 U.S. 294, 324-25 (1962).

Cross-elasticity tests are used to determine close substitutes and measure the responsiveness of buyers and sellers of one product to a change in the price of a similar

particular product can practicably turn for alternative sources of supply, or the area in which sellers sell this product.¹⁵ No single geographic market definition is likely to be decisive for all purposes of examining a particular industry.¹⁶ Assessment of potential market power is then made by identifying the buyers and sellers in these markets.

C. Application of Framework to Radio Broadcasting

1. Product and Geographic Market Definitions

11. The current radio ownership rules focus on the number of stations owned in national and local markets. The national limits view group ownership of radio stations located in New York City, Los Angeles and Pittsburgh as posing the same problem as group ownership of stations in Altoona, Pennsylvania, Paducah, Kentucky, and Effingham, Illinois.¹⁷ The local limits are applied to New York City, where there are 43 commercial stations, in the same way they are applied to Lynchburg, Virginia, where there are 17 stations.

12. Radio stations operate in two distinct, yet related, markets, and the ownership restrictions impact both. Radio stations purchase or produce programming in a *radio programming production market*. Activity in the radio programming market can range from hiring a local disc jockey to picking up a satellite feed of the Super Bowl broadcast. Many programs, such as syndicated talk shows, "top-forty" shows, and sports programming can be obtained from national suppliers. Because radio stations can reasonably turn to other sources of supply outside of their local service area for much of their programming, we view the market for radio programming production as national in scope.¹⁸

product. See Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 945-48 (1981); see also Network Inquiry Special Staff, FCC, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION 334 (1980) (hereinafter "NETWORK INQUIRY") ("[t]he relevant product market includes all products reasonably substitutable for each other at prevailing prices.").

¹⁵ *Grinnell Corp.*, 384 U.S. at 575-76; *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 330-33 (1961); *Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc.*, 714 F.2d 351, 355 (4th Cir. 1983).

¹⁶ See, e.g., NETWORK INQUIRY, *supra* note 14, at 337-38 (in analyzing television, while "markets for television equipment and programs may reasonably encompass the entire nation, the geographic market for home viewed television programming might be extremely local").

¹⁷ See NETWORK INQUIRY, *supra* note 14, at 362.

¹⁸ *Grinnell*, 384 U.S. at 575-76.

13. Radio stations then distribute this programming in a complex local market and essentially derive their revenue by competing for listeners and advertisers. While listeners are able to receive the radio signal free of charge, listeners in essence "pay" for the service by listening to the advertising. As a result, the "buyers" in the *radio programming distribution market* are advertisers and listeners, and the "sellers" are radio stations. Because radio stations have limited signal contours, the radio programming distribution market is essentially local in character.

2. Impact of National Ownership Rules on Radio Programming Production Market

14. Since the *radio programming production market* operates on a national level as well as a local level, the extent of nationwide ownership of radio stations and the rules regulating such ownership could possibly impact this market. The Commission's radio station ownership rules address horizontal concentration of radio stations at the national level. Nationally, there is a total of 11,710 radio stations, 9,995 of them commercial.¹⁹ The current rule allows that, under certain circumstances, one person may hold an attributable interest in up to 46 commercial radio stations nationally.²⁰ Forty-six stations out of 9,995 commercial stations do not even constitute one-half of one percent. Because of these low limits, a common measure of market power, the Herfindahl-Hirschman Index, would be extremely low (no more than 50), suggesting that current national ownership levels should not pose competitive problems in the programming production market.²¹ In essence, the current rules require that there be at least 200 participants in the radio broadcasting industry nationwide. Indeed, while the current rule clearly prevents anticompetitive levels of concentration, it may also prevent efficiencies from joint ownership.

¹⁹ FCC Press Release, "Broadcast Station Totals as of September 30, 1994," Mimeo No. 50164 (released October 12, 1994).

²⁰ This figure of 46 total stations accounts for the current general limit of 20 AM and 20 FM stations, as well as the incentive permitting a non-controlling interest in an additional three stations per service that are controlled by minorities or small businesses. As detailed later in this item, we are increasing the minority ownership limit to 25 AM and 25 FM stations and we are raising the minority/small business incentive to five stations per service.

²¹ The Herfindahl-Hirschman Index ("HHI") is a measure of industry concentration and is the sum of the square of the market shares of all industry participants. See F. M. Scherer and D. Ross, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 72 (1990). According to the Department of Justice/Federal Trade Commission Merger Guidelines, industries with HHIs less than 1,000 are "unconcentrated" and mergers "are unlikely to have adverse competitive effects and ordinarily require no further analysis." *U.S. Department of Justice and Federal Trade Commission Merger Guidelines*, § 1.51(a), 57 Fed. Reg. 44,552 (1992) ("*Merger Guidelines*").

15. Diversity is the primary rationale for national ownership limits. As stated above, while the longstanding position of the Commission has been that diversity of owners leads to diversity of viewpoint, the Commission in recent years has favored relaxing the national limits. When the Commission first revised the national ownership rules in 1984, it highlighted the tremendous growth in the number of media outlets since the rules were first adopted.²² That growth and the large number of stations available ensure that the Commission's current, more flexible, rules do not inhibit diversity of viewpoint.

3. Impact of Local Ownership Rules on Radio Programming Distribution Markets

16. The issues regarding local concentration of radio station ownership are more complicated. Radio stations generate profits in the *radio programming distribution market* with advertising revenues greater than the total cost of production. A radio station having market power in a particular locality may exercise this power either through increasing the price of advertising, lowering costs (perhaps lowering programming quality), or through a combination of the two. As a result, in small local markets, the presence of only a few rival radio station owners may raise competitive concerns that such markets could become highly concentrated.

17. In markets with fewer than 15 stations, the current rule allows one individual or entity to own up to three stations (no more than two of which may be in the same service), or fewer than half the total number of stations in the area, whichever is less. As a result, a market with five to nine stations might have only three separate owners, depending on the distribution of AM and FM stations. As a result, a nine-station market could end up being regarded as "highly concentrated" under the DOJ/FTC merger guidelines.²³ These five- to nine-station markets represent a very small segment of the radio industry, however, given that approximately 75 percent of the U.S. population lives in markets with 15 or more radio stations.

18. In local markets with 15 or more radio stations, the current rule prevents ownership beyond four stations (two AM and two FM) and imposes a combined audience share cap of 25%. The current rules therefore permit, in markets with 16 stations, for example, as few as four groups of four stations, which would still be considered "highly concentrated" under the merger guidelines. In larger markets, however, the rules tend to create an "unconcentrated" structure, since even in the largest local markets no entity may own more than four stations. For example, in New York City, where there are 43

²² See *Report and Order* in Gen. Docket No. 83-1009, 100 F.C.C. 2d 17 (1984), *reconsidered*, 100 F.C.C. 2d 17 (1985). That proceeding raised the overall national ownership limits for radio and television from seven stations per service to 12 stations per service. It did not encompass the local ownership rules.

²³ See *Merger Guidelines*, *supra* note 21, at § 1.51(c).

commercial stations, no one person may own more than 9.3% of these radio stations.²⁴

19. The 1992 increase in the local ownership limits was based on the Commission's belief that consolidation of ownership can provide significant benefits to the radio industry. As discussed previously in this docket, common ownership of radio stations in a single local market permits those stations to function cooperatively with respect to advertising sales, programming, promotion, production and other operations. Group ownership also allows for the sharing of studio space, equipment and other resources.²⁵ By lowering overall operating costs, such consolidation may permit a station to spend more money on programming quality and to lower advertising rates. In turn, consolidation may enable group-owned stations to become more vigorous competitors in the marketplace than they would be individually.

20. The local ownership rules are also based on diversity grounds. As pointed out above, outlet diversity at the local level has risen in recent years. The past ten years have seen not only a substantial increase in the number of radio stations,²⁶ but also an increase in other competing media outlets. The Commission pointed out this substantial increase in the number and variety of competing mass media providers in relaxing the contour overlap definitions germane to the local radio ownership rule in 1989.²⁷

21. In addition, higher levels of concentration may actually increase diversity, especially in small markets. For instance, the 1970 Commission decision allowing AM-FM combinations in the same local area was predicated on the observation that unless AM-FM combinations were allowed, the FM allocations might remain unused.²⁸ Thus, a small

²⁴ The 43-station total is based on Arbitron data for the market and therefore includes only those stations that meet Arbitron's minimum reporting standards. *See Report and Order*, 7 FCC Rcd at 2778 n.100. As a result, the actual number of stations received by listeners in the market may be significantly greater.

²⁵ *Report and Order* at 2760-61; *First Reconsideration Order* at 6388.

²⁶ The number of FM radio stations has grown from 4,374 in 1980 to 6,762 today, an increase of 55 percent. The number of AM stations has risen from 4,589 in 1980 to 4,925 today (7 percent).

²⁷ *See First Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1723 (1989). That proceeding retained the one AM/one FM limit but permitted a single owner to acquire stations in closer proximity than was previously allowed by revising the relevant overlapping signal contours from 1 mV/m to 5 mV/m for AM and from 1 mV/m to 3.16 mV/m for FM.

²⁸ The Commission noted that allowing common ownership "will preclude the possible demise of many FM stations." *First Report and Order* in Docket No. 18110, 22 F.C.C.2d 306, 319 (1970), *reconsidered*, 28 F.C.C.2d 670 (1971).

market may be better served by permitting three licensees to own six radio stations (*i.e.*, two stations each), rather than by permitting three licensees to own three radio stations (*i.e.*, one station each) and letting the other three stations remain off the air. In addition, multiple ownership may well encourage program content diversity because a firm owning several competing local stations has a strong incentive to program those stations with different formats in order to compete for different segments of the audience. Separate owners, on the other hand, might be more likely to direct their programming at the same listeners and follow similar formats.²⁹

22. In sum, a competitive analysis of the local ownership rules suggests possible problems with the current ownership restrictions in small markets where few stations exist and substantial market concentration is permitted. On the other hand, there is not enough data in this record to draw any conclusions concerning whether these levels of concentration hinder or may actually help achieve optimum market performance. Finally, as noted in the staff's *Radio Station Ownership Report*, released concurrently with this item, there has been too little experience under the new rules to make any conclusions regarding the impact of our relaxed local radio ownership restrictions.

23. Given this analytical framework, we now turn to the specific issues raised by the petitioners for reconsideration of the *First Reconsideration Order*. First, we take up petitioners' requests that we revise the local ownership rules. We next consider petitioners' requests that we modify the national minority ownership caps. Finally, we will consider other issues raised by petitioners, including the treatment of time brokered stations and specific questions regarding implementation of the ownership rules.

III. LOCAL OWNERSHIP LIMITS

24. The *First Reconsideration Order* revised Section 73.3555 to permit a single owner in a larger market to own up to two AM and two FM stations, subject to an audience share cap of 25 percent, and to permit an owner in a smaller market to own up to three stations, provided that no more than two are in the same service and that the stations represent fewer than half of the total number of stations in the area.³⁰ A "market" is defined with respect to overlapping signal contours. For instance, the relevant market with respect to a combination of two stations in the same market would encompass those two stations as well as all other radio stations whose principal community contours overlap those of the two stations involved in the proposed transaction.

²⁹ See Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q. J. ECON. 194 (1952).

³⁰ *First Reconsideration Order*, 7 FCC Rcd at 6393-94.

A. LULAC and NABOB/NBMC

25. LULAC argues that the new local rules disadvantage small stations. It contends that while large and profitable stations gain market power through consolidation, small stations will see their market shares decrease and will be unable to find financing for their own consolidations. In this regard, NABOB/NBMC reiterate their previous argument that increased ownership limits will substantially reduce opportunities for increased minority ownership in broadcasting and will force minority broadcasters out of the radio industry.³¹ LULAC restates the suggestion it raised in its previous petition for reconsideration that, rather than change the local ownership rules, the Commission should "expand the 'failed station' doctrine" to permit common ownership of radio stations "that need economies of scale in order to remain economically viable."³² LULAC also takes issue with the Commission's characterization in the *First Reconsideration Order* of its proposal as one that would virtually require a station to leave the air before receiving assistance. In this regard, LULAC notes that a station could be considered failed or failing if, for example, it could "show its likely decline, through financial projections prepared by an outside expert."³³ LULAC asserts that allowing mergers between failing stations will provide the benefits of common ownership to those stations that need them, while retaining the more restrictive local ownership rule, and the diversity benefits achieved by the prior rule, for all other stations.³⁴

26. In opposition, NAB contends that adoption of LULAC's proposed failed station standard, in lieu of the ownership limitations adopted in the *First Reconsideration Order*, would impede the positive effects of the new rules. NAB submits that the new rules, by affording relief to all stations, will benefit consumers generally by not only allowing struggling radio stations to remain operational, but by also increasing competition throughout the radio industry by increasing its overall economic strength.³⁵

27. *Discussion.* The Commission directly addressed LULAC's suggestion to adopt a failed station standard in the *First Reconsideration Order*. The Commission stated:

This "failed station" standard is insufficient to achieve the goals of this proceeding because it would focus on the health of a few individual stations rather than the vitality of the industry as a whole. Moreover, under such a standard, stations would virtually have to leave the air before they could

³¹ NABOB/NBMC Petition at 3, 9-10.

³² LULAC Petition at 4.

³³ *Id.* at 5.

³⁴ *Id.* at 3-5.

³⁵ NAB Comments at 4-6.

receive assistance. We prefer a rule that would assist stations before they reach the point of failure.³⁶

LULAC's argument, that its "failing" station standard would permit a troubled station to obtain ownership relief well before it actually fails, does not adequately address our fundamental concern with the vitality of the industry generally. We remain persuaded that the benefits, to both radio stations and consumers, from increased ownership efficiencies should not be limited to failing or failed stations. LULAC has presented no new evidence or argument, and we find no independent basis to revisit that view. NABOB/NBMC likewise have not presented any new information that would persuade us to further modify the local limits; we will address their overall concerns regarding the national limits in Section IV, *infra*. In sum, consistent with our analysis of competition and diversity issues germane to the industry, and consistent with our evaluation of the benefits of increased group ownership identified previously in this proceeding,³⁷ we continue to believe that the rules as adopted are necessary to invigorate intra-industry competition and include adequate safeguards to ensure that diversity of viewpoint is maintained.

28. While we decline to modify our local ownership rules, we take this opportunity to make a minor correction. A reference to "the most recent published audience share data available at the time that the application is filed" was deleted from Section 73.3555(a)(3)(iii) when that rule section was revised (and renumbered) pursuant to the *First Reconsideration Order*. That deletion was inadvertent, and the quoted provision was intended by the Commission to remain in the rules.³⁸ Section 73.3555(a)(3)(iii) will be modified to reinsert that language, as set forth in the Appendix.

B. NAB and Duke

29. In its petition for rule making, NAB maintains that while the revised ownership rules will provide benefits to most radio broadcasters, there are instances, particularly in smaller markets, where strict application of the market definitions in the rules could yield results opposite those intended by the Commission. Specifically, NAB points to cases where a station with a large signal contour is licensed to a small community and seeks to combine or enter into a time brokerage arrangement³⁹ with another station licensed to the same area. While the stations only truly compete in the small market, NAB contends, the proposed combination may nonetheless be evaluated under the large market rules, including the 25 percent audience share cap, because the wide contour of one of the stations can result

³⁶ *First Reconsideration Order*, 7 FCC Rcd at 6390 n.19.

³⁷ *See Report and Order* at 2773-76; *First Reconsideration Order* at 6388, 6393.

³⁸ *Franklin Communications Partners, L.P.*, 8 FCC Rcd 4909, 4911 (1993).

³⁹ For a detailed discussion of issues regarding time brokerage, see Section V, *infra*.

in more than 14 stations being considered part of the relevant market. This anomalous result, NAB argues, would leave the stations "without access to the benefits of consolidation and cost efficiency."⁴⁰ Thus, while NAB generally commends the principal community contour-based market definitions adopted in this proceeding, it contends that some adjustment in this approach is needed in cases such as it has described.

30. NAB accordingly suggests that when only one of the stations in a proposed combination has a principal community contour that would place the transaction in a market of 15 or more stations, the parties to the transaction should be permitted to elect how the transaction will be evaluated. NAB suggests that such licensees choose to be governed by either (1) the rules for small markets based on the number of stations overlapping the smaller facility's contour (thus avoiding the audience share limitation); or (2) the rules for large markets, but with the audience share calculated based on all counties receiving any one of the 15 or more stations counted as in the market pursuant to Section 73.3555(a)(3)(ii).⁴¹

31. Duke raises similar concerns with the contour-based market definitions in the new rules when applied in "small" markets, but proposes a very different solution than that offered by NAB.⁴² To resolve this situation, Duke suggests a delineation of two tiers of

⁴⁰ NAB Petition at 3.

⁴¹ *Id.* at 14. NAB points to the case of certain stations in Bismarck, North Dakota, as exemplifying the "anomalous" small market problem it has raised. We note that the licensees of the stations involved in that example separately filed a request for declaratory ruling seeking relief from the audience share limitations of the rules. Because the request raises factual arguments specific to the circumstances in that case, we will address the merits of the declaratory ruling request separately.

⁴² As an example of the small market problem, Duke describes his own attempts to acquire KBTM(AM) and KJBR-FM, Jonesboro, Arkansas, while retaining control of an FM station, KFIN, also licensed to Jonesboro. Duke relates that Jonesboro, a community of just over 45,000, is neither a Metropolitan Statistical Area nor an Arbitron market, and is ranked as the 176th television market. These factors, in Duke's estimation, suggest that his attempt to acquire another broadcast facility in Jonesboro be evaluated as one involving a "smaller" market. However, Duke asserts that by virtue of the signal contour of KJBR-FM, a Class C station, the area encompassed by the combined contours of the stations he proposed to own was overlapped by the principal community contours of 38 other stations, including five from Memphis, Tennessee, over 60 miles from Jonesboro, making his proposed acquisition subject to the evaluation accorded "larger" (15 or more stations) markets. In these circumstances, Duke contends that the overlapping contour approach distorts the market by encompassing areas "well beyond the ability to influence the market where the proposed merger is located." *Letter to Chairman Sikes*, dated October 12, 1992, at 1. He believes that the Commission did not intend for a market like Jonesboro to be placed in the same category as larger markets like Memphis and Little Rock as a result of such signal overlap.

markets based on Metropolitan Statistical Area (MSA) ranking, with "larger" markets still subject to the combined audience share limitation of 25 percent, and "smaller" markets not subject to the combined audience share limitation in the absence of a showing that the particular combined share exceeding 25 percent creates an excessively high concentration of audience. He specifically proposes that MSAs ranked above 150⁴³ would be placed in the "larger" market tier, while those MSAs ranked 150 and below, as well as non-MSA markets such as Jonesboro, would be placed in the "smaller" market tier.⁴⁴

32. Turning to another aspect of the smaller market rules, NAB asserts that because broadcasters in markets with fewer than 15 stations are now limited to less than half, rather than up to half, of the market's stations, a station owner in a market with four or fewer stations cannot acquire even a failing station in need of "rescue," and the owner of a preexisting AM/FM combination cannot acquire another station in the market unless there are at least seven stations in the market. Therefore, NAB suggests that the local ownership rule be modified so that ownership of "not greater than 50 percent" of the stations in a market would be permitted rather than the current "less than 50 percent" rule. This would allow, NAB argues, the rescue of failing or dark stations by a successful broadcaster in a genuinely small market. In addition, NAB contends that any single station or AM/FM combination licensee should be allowed in all situations to add one additional station to common ownership.⁴⁵

33. In suggesting its refinements, NAB believes that small market broadcasters would be able to take advantage of the benefits and efficiencies of the new ownership and time brokerage rules articulated in the *First Reconsideration Order* without significantly changing the concentration of control in local radio and advertising markets. In this regard, NAB states that the additional consolidation of small market radio stations that could result, however modest, outweighs any possible or perceived detriments. In fact, NAB suggests that small markets may become even more competitive if certain local radio stations realize efficiencies from consolidation and become stronger competitors offering increased program

In *Patteson Brothers, Inc.*, 8 FCC Rcd 7595 (1993), the Commission refused to grant Duke a permanent waiver of the rules, concluding that an insufficient showing had been made to overcome the *prima facie* concern raised by the rule that the combination could lead to excessive concentration.

⁴³ The 150th MSA is Appleton-Oshkosh-Neenah, Wisconsin, which has 13 stations licensed within the MSA.

⁴⁴ In this regard, Duke states that there are 350 cities with a population of 50,000 that qualify as MSAs in the United States, and he asserts that the smallest MSA with more than 15 radio stations is the 258th-ranked Lynchburg, Virginia, MSA with 17 stations. *Letter to Chairman Sikes*, dated October 12, 1992, at 2.

⁴⁵ NAB Petition at 15-16.

diversity. In addition to the benefits to be realized by smaller market broadcasters, NAB maintains that the public is appropriately served by stations with greater financial health and potential to provide service, particularly where the alternative would be dark or failing stations.⁴⁶

34. Finally, in the event the above changes are not adopted, NAB believes that a clear and liberal set of criteria should be established for requests for waiver of the local ownership rule in traditionally small markets. Among the critical elements of any waiver policy, according to NAB, would be the effort to save a dark or failing station.⁴⁷

35. *Discussion.* We are not persuaded by NAB or Duke to forego the present scheme of overlapping signal contours to determine the number of stations in a market for evaluating proposed common ownership, or otherwise to modify the application of the rules. In designing the signal overlap standard, the Commission opted for a realistic measure of the potential impact of proposed common ownership on competition and diversity, and specifically rejected suggestions that Arbitron data, MSAs (proposed by Duke here) or other narrow geographic designations be employed to count the number of stations in a market. The Commission stated:

We believe that the use of this station [contour overlap] counting method will address our core concerns of competition and diversity. We are convinced by petitioners' arguments that this revised measure will reflect the actual options available to listeners and will reflect market conditions facing the particular stations in question.⁴⁸

There is no evidence to suggest that the rationale underlying the adoption of the contour overlap approach -- a more accurate measure of where a station's signal can be adequately received and, therefore, where it can compete for listeners -- is any less appropriate for stations in smaller markets under the circumstances presented by NAB and Duke. A station combination with an aggregate principal community contour overlapped by 15 or more stations can be expected to compete for listeners with those stations, and the audience share cap is applied in such a case as an additional safeguard intended to identify potential concentration problems that may threaten diversity and competition.⁴⁹ Moreover, the Commission has recognized that the signal overlap standard is likely to be conservative in counting the stations receivable by listeners because, in some instances, listeners may be able

⁴⁶ *Id.* at 9, 13-16.

⁴⁷ *Id.* at 16-17.

⁴⁸ *First Reconsideration Order*, 7 FCC Rcd at 6395.

⁴⁹ *See First Reconsideration Order*, 7 FCC Rcd at 6396; *Report and Order*, 7 FCC Rcd at 2779.

to receive signals beyond the predicted principal community contour of a particular station.⁵⁰

36. We decline to, in effect, ignore those stations, such as Class C FM stations, with superior signal coverage. We also decline to redefine the area to which county-by-county audience share calculations apply in the manner suggested by NAB. We believe the suggested change would unduly dilute the diversity and competition safeguards adopted in our previous orders, and, in any event, would not reflect competitive conditions in the areas in which stations proposed to be combined provide the majority of their service, *i.e.*, within their principal community contours.

37. With respect to NAB's other proposals, the Commission has already expressly rejected a change of the rule applicable to markets of fewer than 15 stations to permit ownership of "*up to 50 percent of the stations in [such] a market . . . rather than the adopted limit of less than 50 percent, [because it] could result in an unwarranted level of consolidation in too many markets.*" *First Reconsideration Order*, 7 FCC Rcd at 6394 (emphasis in original).⁵¹ On the record before us, and consistent with our above analysis of competition and diversity in the radio industry, we continue to believe that NAB's suggestions to permit "not greater than 50 percent" ownership in a given radio market, or, for that matter, an across-the-board increase of one station per single station or AM/FM combination licensee, "presents too great a potential to dominate the local radio market." *Id.* Further, we are not persuaded that the specific changes NAB advocates are warranted as a means of rescuing failing or dark stations. First, as proposed, these changes would be applicable without regard to the circumstances of an individual facility or its financial condition, and would have the potential to increase concentration significantly. Second, cases involving a genuine threat of station failure can be and are best considered by a waiver process that can appropriately account for the specific factual circumstances at hand.

38. Moreover, we are not persuaded that a specific set of criteria need be established to govern "small market" waiver requests generally. Because of the variety of particular circumstances that may be present in any given radio market, we believe that any requests for waiver of this particular rule should not be limited at this point to specific criteria.⁵² Rather, we believe that any deviation from our local ownership rule must be based on a specific showing that the facts of a particular case warrant an exception and that the requested action is consistent with the overall objectives of that rule in the individual market under examination. The facts adduced in support of a waiver may, in any given case,

⁵⁰ *Report and Order*, 7 FCC Rcd at 2779.

⁵¹ The effect of the "less than 50 percent" provision is to limit common ownership to either two stations (markets with 5 or 6 stations) or to preclude common ownership altogether (markets with 4 or fewer stations), unless the combination is AM/FM, which is expressly permitted in all circumstances.

⁵² *See, e.g., WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

include evidence that one station is facing particular financial difficulties; however, we shall not require such a showing as a precondition to every waiver request, nor shall such a showing necessarily be sufficient to justify grant of a waiver.

C. Summary

39. In sum, applying the principles of competition and diversity discussed earlier in this document, we are not persuaded by petitioners to further modify our restrictions on local multiple ownership to make them either more restrictive or more lenient at this time. The petitioners' arguments that the revised local rules will prejudice small station owners and minority broadcasters, as well as the contrary arguments that the rules are unduly restrictive, were all fully addressed in the *First Reconsideration Order*, and no party has raised a compelling new argument on this point. The Commission has already stated its belief that small market or struggling stations can benefit from the relaxed local rules in that the new rules permit them to consolidate resources with other stations. We also recognize, as mentioned in Section II, *supra*, that increased consolidation may potentially lead to undue market concentration and decreased diversity of viewpoint in certain very small markets. Nonetheless, we continue to believe that concerns about the impact of the rule changes on some small stations that might face stiffer competition are "outweighed by the considerable public benefit we anticipate from a general strengthening of stations as a result of an increase in the local ownership limits."⁵³ In any event, as noted in the staff's *Radio Station Ownership Report* released concurrently with this item, there has been too little experience under the new rules to conclude that our predictions in relaxing the local ownership restrictions were ill-founded. We intend to continue to monitor the effects of the relaxed rules and will take further action as necessary.

IV. MINORITY OWNERSHIP AND SMALL BUSINESS INCENTIVES

40. The Commission, in 1985, relaxed its national broadcast ownership limits to permit any single individual or entity to control up to 12 stations in each broadcast service (AM, FM and TV).⁵⁴ It also determined that a minority incentive should be included in the new rules and therefore permitted "group owners of television and radio stations . . . to utilize a maximum numerical cap of 14 stations provided that at least two of the stations in which they hold cognizable interests are minority controlled."⁵⁵ Under this provision, non-minority multiple owners could control 12 stations and hold a non-controlling but cognizable

⁵³ *First Reconsideration Order*, 7 FCC Rcd at 6393-94.

⁵⁴ *Memorandum Opinion and Order* in Docket 83-1009, 100 FCC 2d 74 (1985).

⁵⁵ *Id.* at 94.

interest in two additional stations. Minority-controlled multiple owners could directly own and control the additional two stations.

41. The *Report and Order* in this proceeding declined to incorporate minority incentives in the revised national multiple ownership rules that it adopted. The *First Reconsideration Order*, however, reinstated and expanded one aspect of the former rule's minority incentive provision by permitting all multiple owners to hold a cognizable, but non-controlling, interest in an additional three AM and three FM stations that were minority-controlled. Unlike the prior rule, the revised rule did not permit minority multiple owners to hold a controlling interest in the additional stations. The new rule also expanded the class of entities that could control the additional stations to include not just minorities, but small businesses as well.⁵⁶

42. NABOB/NBMC urge the Commission to reinstate the aspect of the prior rule that permitted minority-owned companies to take a controlling interest in additional stations above the national ownership caps. They argue that in revising the rule, the Commission focussed on how to encourage investment in minority broadcasters, when the ultimate goal should be how to increase minority ownership. In other words, NABOB/NBMC contend that the fostering of investment by non-minority companies in minority-owned stations should not be of itself an "end," but rather a "means" to the end of increased minority ownership. NABOB/NBMC maintain that the change from the prior rule will have a negative impact on overall minority ownership because it will decrease the total number of stations that can be controlled by existing minority licensees, and, with the increase of the national ownership limits generally, will lead to further concentration of ownership in the broadcast industry, diluting substantially the opportunities for increased minority ownership of broadcast facilities.⁵⁷

43. NABOB/NBMC also contend that the *First Reconsideration Order* did not provide evidence with which to evaluate the effect of the rule changes on minority ownership, and they reiterate their argument, rejected in the *First Reconsideration Order*, that the Commission's appropriations legislation prohibits modification of the minority ownership incentive.⁵⁸ Further, NABOB/NBMC reiterate their request, denied in the *First*

⁵⁶ "Small business" was defined as an individual or entity with annual revenues of less than \$500,000 and assets of less than \$1,000,000, including all affiliated entities under common control. *First Reconsideration Order* at 6391. Because this definition was adopted prior to enactment of the Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366, 106 Stat. 999 (enacted September 4, 1992), prior approval of the Commission's use of this definition by the SBA was not required.

⁵⁷ NABOB/NBMC Petition at 5-10.

⁵⁸ *Id.* at 7-9.

Reconsideration Order, that the national ownership limits be returned to 12 stations per service, claiming that any increase would lead to further concentration of ownership in the broadcast industry and substantially reduce opportunities for increased minority ownership.⁵⁹

44. LULAC, NABOB/NBMC and NAB urge the Commission to repeal the small business incentive established in the *First Reconsideration Order*. LULAC and NAB argue that adoption of the small business incentive violated the Administrative Procedure Act (APA), 5 U.S.C. §553, because such an incentive was not proposed in the initial *Notice of Proposed Rule Making* in this proceeding.⁶⁰ LULAC and NABOB/NBMC view the small business limitation as a "loophole in the national ownership limits" that is open to abuse.⁶¹ For example, they contend, a group owner may set up a family member or business associate as a "small business," or a corporation could set up another corporation whose stock is held by its own stockholders.⁶² Further, the petitioners maintain that the small business incentive will dilute or otherwise undermine the Commission's efforts to increase minority ownership in radio by vitiating any incentive for group owners to invest in minority-controlled stations.⁶³ NAB similarly suggests that because the small business incentive could weaken minority ownership provisions, that initiative may be at odds with Congressional intent to promote minority ownership.⁶⁴

45. *Discussion.* We continue to believe, as discussed both above and previously in this docket, that further expansion of the national ownership limits would not hinder diversity of viewpoint and could spur competition in the industry. The arguments raised by petitioners with respect to the increase in the general national ownership limits from 12 stations per service to 20 stations per service were fully addressed earlier in this proceeding. Because petitioners present no new arguments or evidence on this subject, we find no basis to revisit our earlier conclusions in raising the national ownership limits.

46. We are persuaded by petitioners, however, that permitting minority owners to hold a controlling interest in additional radio stations will serve the goal of increasing minority ownership without posing a significant threat to competition or diversity. We will therefore amend Section 73.3555 of our rules to permit minority owners to own and control additional stations over and above the general national caps. Moreover, based on our belief

⁵⁹ *Id.* at 3.

⁶⁰ LULAC Petition at 9-10; NAB Comments at 9.

⁶¹ NABOB/NBMC Petition at 6.

⁶² LULAC Petition at 7-8; NABOB/NBMC Petition at 6-7.

⁶³ LULAC Petition at 6-7, NABOB/NBMC Petition at 6-8, NAB Comments at 7-9.

⁶⁴ NAB Comments at 7-9.

that further national consolidation is appropriate, we will increase from three to five the number of additional stations per service that may be acquired pursuant to the incentive. Our aim in making these modifications is to permit minorities to own more stations as well as to make the investment incentive aspect of the rule more attractive to large group owners.

47. We are not persuaded that we should delete the small business incentive. We believe that our current application processing standards, which involve a case-by-case analysis of each transaction, are sufficient to guard against sham small business applications. With respect to petitioners' arguments regarding notice, we point out that the *Notice of Proposed Rule Making* in this proceeding invited commenters to discuss a range of issues regarding the national ownership caps, and some commenters emphasized that access to capital is a problem for new entrants and small businesses in general, not just minority-owned entities.⁶⁵ As a result, the *First Reconsideration Order* concluded that adopting both minority and small business incentives would be appropriate. Further, we note that we intend to explore minority ownership issues in an upcoming proceeding, with an eye toward eliminating barriers currently facing minorities seeking to enter the industry or expand their present holdings. We plan to use that proceeding to consolidate outstanding proposals related to minority ownership as well as to gather and evaluate new ideas.⁶⁶ This approach will permit us to formulate a more comprehensive view of the problems facing minority broadcasters specifically, and to develop a regulatory framework that addresses those problems in as complete and as effective a manner possible.

48. In sum, minority owners will be permitted to own and control up to 25 AM and 25 FM stations. Non-minority owners will be permitted to own and control up to 20 AM and 20 FM stations per service and may hold a non-controlling interest in five additional stations per service, provided that those additional stations are controlled by minorities or

⁶⁵ See *First Reconsideration Order* at 6390.

⁶⁶ For example, the forthcoming minority ownership item will likely incorporate the "incubator" program approach presented in the *Further Notice of Proposed Rule Making* in this proceeding, 7 FCC Rcd 6387, 6391 (1992), and certain aspects of the *Notice of Proposed Rule Making and Notice of Inquiry* regarding sources of capital, 7 FCC Rcd 2654 (1992).

small businesses. See Appendix.⁶⁷

49. We note that, pursuant to the rules adopted in the *First Reconsideration Order*, our national ownership limits automatically increased from 18 AM and 18 FM to 20 AM and 20 FM on September 16, 1994. On October 7, 1994, NABOB and NBMC filed a "Joint Motion for Rescission and Stay" asking us to rescind the automatic increase and stay the effective date of that increase. Specifically, they request that the rules be held in abeyance until the Commission has acted on their petition for reconsideration and evaluated the effect of the 18AM/18FM cap on minority ownership. We resolve NABOB/NBMC's petition for reconsideration in this *Second Reconsideration Order*. Moreover, our *Radio Station Ownership Report* analyzes the effect that the increase in our national caps has had on minority broadcasters to the extent presently possible. Accordingly, we find the request for stay of our rules to be moot, and the request for rescission is denied.

V. TIME BROKERAGE ARRANGEMENTS

50. As we stated in the *Report and Order*, "time brokerage is a type of joint venture that generally involves the sale by a licensee of 'discrete blocks of time to a "broker" who then supplies the programming to fill that time and sells the commercial spot announcements to support it.'"⁶⁸ The *First Reconsideration Order* affirmed the Commission's holding in the *Report and Order* that if a time brokerage agreement between two stations in the same market involves more than 15 percent of the brokered station's programming per week, the brokered station will be treated as if it was owned by the brokering station for purposes of the national and local ownership rules.⁶⁹

51. TRAC/WACC's petition for reconsideration of the *Report and Order* argued that various staff rulings in time brokerage cases were contrary to law and policy in that they permitted "excessive delegation of programming control in violation of the Communications Act." In the *First Reconsideration Order*, the Commission responded:

⁶⁷ While we have concluded that there are sound policy reasons to alter the revisions to the minority incentive provisions of the radio ownership rules adopted in the *Report and Order* and the *First Reconsideration Order*, we again reject petitioners' view that those revisions were contrary to the Commission's appropriations legislation. That legislation prohibits the Commission from altering its comparative licensing, distress sale and tax certificate policies relating to minorities, and nothing we have done in this proceeding has altered those policies. See Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 103-121, 107 Stat. 1153 (1992).

⁶⁸ 7 FCC Rcd at 2784.

⁶⁹ *First Reconsideration Order*, 7 FCC Rcd at 6400-01.

TRAC improperly seeks reconsideration here of staff decisions issued two years ago. We believe that determinations regarding a licensee's retention of control of its time brokered station are most appropriately made on a case-by-case basis. This has been and will continue to be our practice in the time brokerage area.⁷⁰

52. In their instant petition, TRAC/WACC take exception to that response, suggesting that it did not reach the core of the issue presented -- licensee compliance with the Communications Act and control of programming. TRAC/WACC reiterate that licensees must remain responsible for compliance with, among other things, equal employment opportunity policies, sponsorship identification, and format and programming choices, and again contend that the staff rulings are permitting improper delegation of these licensee responsibilities. In this regard, TRAC/WACC argue that the Commission should not be "bound in future rule makings by policy decisions of its staff made in *ex parte* informal adjudications."⁷¹ TRAC/WACC also note that members of the public are not given notice of, and may not have standing to participate in, declaratory rulings at the staff level. As a result, the Commission's cited statement in the *First Reconsideration Order* is read by TRAC/WACC to suggest that the only way for issues of control to be explored is by the timely filing for reconsideration of staff letters approving of time brokerage agreements. TRAC/WACC contend that this approach would undermine full participation and informed decision making in this critical area. TRAC/WACC insist that the Commission must carefully address this issue to ensure that the fundamental principle of ultimate licensee responsibility is not abandoned.⁷²

53. In opposition, NAB argues that the revised time brokerage rules and policies, as adopted and applied by the staff in its rulings, are lawful and are designed to adequately ensure that licensees do not relinquish control of their stations and remain responsive to the obligations of a licensee. It maintains that the rule requires broadcasters to comply with a reasoned set of limitations and to submit relevant information to the Commission and the station's public files. NAB therefore believes that these requirements satisfy all of the legitimate substantive and procedural concerns of TRAC/WACC.⁷³

54. *Discussion.* The language of the *Further Reconsideration Order* cited by TRAC/WACC was not meant to imply that these time brokerage issues were somehow closed, but rather was intended to reflect our continuing view that particular situations are better resolved on a case-by-case basis. The specific aspects of time brokerage arrangements

⁷⁰ *Id.* at 6401.

⁷¹ TRAC/WACC Petition at 2-4.

⁷² *Id.* at 4-5.

⁷³ NAB Comments at 6-7.

questioned by TRAC/WACC here were thoroughly discussed in the *Report and Order*. There the Commission stated its concern "that widespread and substantial time brokerage arrangements among stations serving the same market, in concert with the increased common ownership permitted by our revised local rules, could undermine our continuing interest in broadcast competition and diversity."⁷⁴ As a result, the Commission adopted restrictions on time brokerage arrangements so that they will be counted as ownership interests where significant brokering between competing stations is involved. Furthermore, we have clearly stated that control, including ultimate authority over programming decisions, must be retained and exercised by brokered stations,⁷⁵ and our staff rulings have consistently emphasized that ultimate control of a station must rest with the licensee.⁷⁶ TRAC/WACC has not introduced any new arguments to convince us that we need to take further action in this proceeding with respect to this, or other aspects, of time brokerage.⁷⁷ Moreover, we believe that imposition of any additional restrictions on these arrangements would run counter to one of our objectives in this proceeding, which was to strengthen the radio industry by giving radio broadcasters more flexibility. We will, however, continue to review allegations of transfers of control in specific cases. In this regard, we note that control issues relating to time brokerage agreements can arise in the renewal context and not simply in the context of requests for declaratory rulings.

55. In light of various questions informally presented to the staff and based on our experience since these time brokerage provisions were adopted, we do believe that it is appropriate to offer more specific guidance on the application of the rules to time brokerage agreements between stations in the same local market. The Commission previously decided not to require the termination of an agreement that does not comply with the local ownership rules if the agreement was entered into prior to the effective date of the rules.⁷⁸ These agreements are, in effect, "grandfathered." We have received informal inquiries concerning whether "grandfathered" time brokerage agreements in "larger" markets may be renewed if the combined audience share of the stations exceeds 25 percent at the time that the initial

⁷⁴ *Report and Order*, 7 FCC Rcd at 2788.

⁷⁵ *See First Reconsideration Order*, 7 FCC Rcd at 6401-02.

⁷⁶ *See, e.g., Letter to Gisela Huberman*, 6 FCC Rcd 5397 (Mass Media Bureau 1991); *Letter to Roy R. Russo*, 5 FCC Rcd 7586 (Mass Media Bureau 1990).

⁷⁷ With respect to TRAC/WACC's concern that the public be permitted to participate in matters involving time brokerage determinations, we note that members of the public may, in the ordinary course, bring matters to the Commission's attention by filing a complaint or raising a challenge in the context of a pending renewal, transfer or assignment application. We do not believe, however, that our procedures must now be amended to permit formal public notice and comment on declaratory rulings in this context.

⁷⁸ *First Reconsideration Order*, 7 FCC Rcd at 6402.

agreement expires. We have received similar inquiries concerning the permissibility of renewing time brokerage agreements entered into after the effective date of the rules if the combined audience share of the stations at the time of expiration/renewal exceeds 25 percent. Additionally, we have received inquiries concerning whether the contract rights associated with time brokerage agreements may be assigned when the brokering station is sold.

56. In the *Report and Order* and the *First Reconsideration Order*, the Commission did not specifically state whether time brokerage agreements may be renewed by the parties or transferred to third parties. We believe that a clear statement in this *Order* of our view on these matters would be helpful both to applicants and to the Commission.

57. When a brokering station is sold, an existing brokerage agreement that would be barred by the rules if entered initially at the time of the sale, may be transferred, subject to the limitation outlined in paragraph 58, *infra*. The new owner may enjoy all rights and limitations with respect to our multiple ownership rules as the original owner, but only for the duration of the term of the agreement in effect at the time of transfer. Thus, if a licensee's combined audience share in a large market for a station it owns and one it brokers grows to exceed 25 percent during the term of the agreement (or if it exceeded 25 percent initially but was grandfathered), that licensee's interests can be sold as a combination and the brokerage agreement can continue in effect for the duration of the initial term of the brokerage agreement. Similarly, if a grandfathered brokerage agreement in a smaller market permitted a licensee to own and broker stations comprising 50 percent or more of the stations in the market, the brokerage agreement could remain in effect for a new owner, for the duration of the initial term of the brokerage agreement. To hold otherwise, as a general matter, could severely and unnecessarily restrict the marketability of stations and station combinations that involve brokerage agreements and seriously undermine the utility of such agreements.⁷⁹

58. The purchaser of a station or stations involved in a brokerage agreement, however, cannot create a new violation or exacerbate an existing violation of our rules by that acquisition. Thus, for example, a station combination that involves a brokerage agreement and that exceeds the 25 percent audience share limit, but is nonetheless permissible under the rules, could not be acquired by a party with another station in the same market. A similar station combination with an audience share of 24 percent could not be acquired by a licensee with a station enjoying a 3 percent share in the same market.

⁷⁹ This is not to say that we will ignore concerns of undue market power achieved pursuant to a time brokerage agreement. In the *Report and Order*, we noted that we will carefully review the circumstances through which any station group reaches or exceeds a 40 percent local market share before consenting to a sale of that station group. *Report and Order*, 7 FCC Rcd at 2783 n.109. This qualification is equally applicable to station groups in which one of the attributable interests is a time brokerage agreement.

59. Finally, parties will not be permitted to renew or extend time brokerage agreements, including those that are grandfathered, once the initial term expires if, at the time of expiration, the agreement would not be permissible under the rules. The Commission required attribution of time brokerage agreements in order to prevent the use of these agreements to circumvent the revised ownership limits.⁸⁰ Allowing the renewal of time brokerage agreements when, for example, the stations' combined audience shares exceed the applicable 25 percent cap, would be tantamount to allowing the entities to have a continuing cognizable ownership interest for an indefinite period of time in stations they could not otherwise own under the local ownership rules.⁸¹ This would be inconsistent with the competition and diversity goals at the heart of the rules. Further, in connection with options to renew or extend time brokerage agreements generally, we reiterate our view that unreasonably long terms in such agreements may call into question a licensee's control of its station.⁸²

VI. REMAINING MATTERS

A. Audience Share Benchmark

60. It has been brought to our attention that there is an inconsistency between the language of the *First Reconsideration Order* and that of Section 73.3555(a)(1)(ii) as published, as to the benchmark for permissible audience share. In order to remove any ambiguity on this point, we note that we intended the language of the rule to be controlling. Thus, only audience shares that *exceed* 25 percent are to be considered *prima facie* inconsistent with the public interest.

B. Non-Operational Stations

61. In the *First Reconsideration Order*, the Commission stated that only operating commercial full-power stations would be counted in determining the number of stations in a market, and that non-commercial stations, translators or stations not operational (*i.e.*, stations for which construction permits have been authorized but that are not yet on the air, or stations that have been silent for more than six months) would be excluded.⁸³ However, we

⁸⁰ *Report and Order*, 7 FCC Rcd at 2788.

⁸¹ The Commission stated that if two stations enter into a time brokerage agreement in a market with 15 or more stations and the audience shares subsequently exceed 25 percent of the market, one station may not purchase the other. *First Reconsideration Order*, 7 FCC Rcd at 6402.

⁸² *Id.*

⁸³ *Id.* at 6395.

wish to clarify that we did not intend to exclude from consideration under the multiple ownership rules non-operational commercial stations that are part of a transaction or that are commonly owned by a party to the transaction. While it is appropriate to exclude non-operational stations from calculation of the number of stations in the market where we cannot presume that they will add to the competition and diversity in a market, such an analysis is not appropriate when the non-operational station is a part of the transaction under scrutiny, because the applicant has control over and can generally be presumed to intend to put the station on the air. Thus, if the non-operational station is one of the proposed commonly owned stations involved in the transaction, the principal community contour of the non-operational station will not be disregarded in calculating how many stations are counted as in the market or in determining the geographic area for which audience share is calculated.

C. Expanded AM Band

62. In connection with improvements to AM service in MM Docket 87-267, the Commission added Notes 9 and 10 to Section 73.3555 of the Rules.⁸⁴ Specifically, Note 9 indicates that an AM licensee may own an existing AM station in the 535-1605 kHz band and apply for a construction permit for an AM station in the expanded band, 1605 kHz-1705 kHz, without regard to otherwise prohibited principal community contour overlap. Moreover, the national ownership restrictions were not applied when an entity with an attributable interest in an AM station in the existing band applies for an AM station in the expanded band. Note 10 specifies a five-year period during which joint ownership of existing band and expanded band AM authorizations will be acceptable; at the expiration of this five-year period, the licensee must elect to operate either the expanded band station or to operate the station on its former frequency in the existing band.⁸⁵

63. Consistent with notes 9 and 10, we wish to clarify how joint ownership of existing and expanded band AM stations will be treated if the licensee proposes to acquire another station. If, during the five-year transition period, the licensee has not yet elected whether to move to the expanded band or retain its existing facility, the expanded band station will be disregarded for purposes of the local and national ownership rules. *Report and Order* in MM Docket No. 87-267, 6 FCC Rcd at 6319-20. Thus, the principal community contour of the existing band station will be considered for purposes of determining the relevant market and for purposes of determining the number of stations in the market. Moreover, if it is necessary to determine whether the combination complies with the audience share cap, we will consider only the audience share attributable in the relevant

⁸⁴ *Report and Order* in MM Docket No. 87-267 (*Review of the Technical Assignment Criteria for the AM Broadcast Service*), 6 FCC Rcd 6273 (1991), *modified on reconsideration*, 8 FCC Rcd 3250 (1993).

⁸⁵ The five-year period begins on the date a construction permit is issued for the new facility in the expanded band. 47 C.F.R. § 73.3555, Note 10.

market to the existing band station. We believe this approach will avoid impediments to merger transactions involving expanded band stations that might discourage migration to the expanded band.

VII. ADMINISTRATIVE MATTERS

Regulatory Flexibility Analysis

64. **I. Need for and Purpose of this Action:** This action is taken to address petitions for reconsideration of changes to the Commission's radio multiple ownership rules, and to address a Joint Motion for Rescission and Stay of our national ownership rules. The Commission believes that this action will enhance diversity in the radio industry by providing greater opportunities for minority and small business broadcasters.

65. **II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:** None.

66. **III. Significant Alternatives Considered and Rejected:** The Commission declined to modify its overall national and local multiple ownership rules for radio or to revisit its position regarding time brokerage. The Commission determined that the rules, as modified earlier in this proceeding, are necessary to invigorate the radio industry by permitting greater consolidation of resources. The Commission did modify its national limit with respect to minority and small business owners by (1) adopting a 25 AM/25 FM cap for minorities and (2) increasing to five the number of additional stations in which non-minority broadcasters may take a non-controlling interest, in addition to the general cap, if those stations are controlled by minorities or small businesses.

Effective Date

67. The changes to the rules adopted in this *Memorandum Opinion and Order* will become effective thirty (30) days from the date of publication in the Federal Register.

Additional Information

68. For additional information regarding this proceeding, contact Jane Hinckley Halprin or Alan E. Aronowitz, Mass Media Bureau, Policy & Rules Division, (202) 632-7792, or Melanie Godschall, Mass Media Bureau, Audio Services Division, (202) 418-2660.

VIII. ORDERING CLAUSES

69. IT IS THEREFORE ORDERED that, pursuant to the authority contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), 303(r), Part 73 of the Commission's Rules, 47 C.F.R. Part 73. IS AMENDED as set forth in the attached Appendix.

70. IT IS FURTHER ORDERED that the petitions for reconsideration filed in this proceeding ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects.

71. IT IS FURTHER ORDERED that, pursuant to Section 1.401(e) of the Commission's Rules, 47 C.F.R. Section 1.401(e), the Petition for Rule Making filed on August 23, 1993, by the National Association of Broadcasters, RM-8414, IS DENIED.

72. IT IS FURTHER ORDERED that the Joint Motion for Rescission and Stay filed October 7, 1994, by the National Association of Black-Owned Broadcasters and the National Black Media Coalition IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Rule Changes

Part 73 of Title 47 of the U.S. Code of Federal regulations is amended to read as follows:

Part 73 RADIO BROADCAST SERVICES

1. The Authority Citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, 334.

2. Section 73.3555 is amended by deleting paragraphs (a)(3)(iii), and (e)(1)(i), and adding new paragraphs (a)(3)(iii), and (e)(1)(i) to read as follows:

* * * * *

(a) * * *

(a)(3)(iii) A station's "audience share" is the average number of persons age 12 or older on an average quarter hour basis, Monday-Sunday, 6 a.m.-midnight, who listen to the station expressed as a percentage of the average number of persons listening to AM and FM stations in that radio metro market or a recognized equivalent, in which a majority of the overlap between the same service stations involved in the transaction takes place. The "combined audience share" is the total audience share of all AM or FM stations that would be under common ownership or control following a proposed acquisition. In situations where the majority of the overlap between the same service stations does not lie in a single metro market, the relevant audience share data is the data for all counties that are within the principal community contours of the mutually overlapping stations proposed for common ownership, in whole or in part, weighted based on the listening population, age 12 and older, and totalled to determine the average audience share. Audience share shall be calculated by using the most recent published audience share data available at the time that the application is filed, unless an alternative showing is submitted pursuant to the Note following 47 C.F.R. Sec. 73.3555(a)(1)(ii).

* * * * *

(e) * * *

(e)(1)(i) more than 20 AM or more than 20 FM stations, provided, however, that minority controlled entities may acquire an additional five stations per service above the national limit, and that multiple owners that are not minority-controlled may hold an attributable, but not controlling, interest in five additional stations per service above the national limit that are minority controlled or small business controlled.

* * * * *

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

Re: Revision of Radio Rules and policies (MM Docket No. 91-140,
RM-8414)

This Order makes certain modifications to our radio ownership rules which I support. In particular, I am encouraged to see additional ownership incentives for minorities and small businesses. However, I remain concerned that allowing minorities and small businesses to own up to 25 AM and 25 FM stations will be an elusive target unless there is greater support from the capital markets for such endeavors.

I also am concerned that our radio ownership report analysis does not specify enough qualitative data regarding the extent to which minority-owned and small stations have benefitted from our relaxed radio ownership rules or local marketing agreements (LMAs). My sense is that they have not benefitted across the board.

I hope that the Commission will seek further data in this regard and make additional adjustments, where necessary, to induce greater flexibility and capital formation support for minority ownership or minority LMA opportunities. I hope we will take up these issues in a further proceeding on minority ownership in the near term.

